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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, et al.,
Appellants,
against
TAX COMMISSION OF THE STATE OF WASHINGTON, et al.,
Appellees.

DAVID H. RYAN,
Appellant,
against
THE STATE OF WASHINGTON, et al.,
Appellees.

Nos. 7, 8.

REPLY BRIEF ON BEHALF OF APPELLANTS

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REPLY BRIEF ON BEHALF OF APPELLANTS

By virtue of an order of this Court entered on June 1, 1937, these cases have been assigned for reargument, with direction to the Clerk "to give notice to the Attorney General of the United States who is requested to present the views of the Government upon the questions (1) as to jurisdiction over the areas in which the work of the several contractors is being performed, and (2) whether the state tax imposes a burden upon the Government."

Because of the identity of the questions of law and fact, a joint brief is being presented by the appellants, and in view of the brief submitted by the Attorney General of the United States it seems advisable to present a recapitulation of the facts conceded, stipulated or admitted.

Facts.

The Columbia River, the second largest in the United States, has its source in lakes in British Columbia, which in turn are fed from mountain streams and lakes of the Rocky Mountains in both Canada and the United States. Because of its physical characteristics partaking in its upper reaches of the character of a mountain stream, with great falls, swift current and intervals of rapids, the alternations in its flow depend upon the melting of snow in the mountains, which make it difficult, if not often impossible, to have navigation of the complete stream without such improvements as are now under construction. The principal tributary of the Columbia is the Snake River which possesses the same characteristics as the Columbia River.

The Columbia, as a result of improvements that have been made and are now in contemplation, is commercially navigable from its mouth to the advent of the Snake, and the Snake from its junction with the Columbia to the confluence of the Snake in clear water. Above the mouth of the Snake the Columbia is navigable from pool to pool as far as the mouth of the Okanogan River, which in turn is navigable for some distance, but all of the navigation is difficult and not commercially feasible because of the conditions above described.

The Columbia River, for the major part of its course within the United States, traverses an arid country which due to the quality of its soil would become immensely productive and rich if placed under irrigation.

The course of the Columbia in the United States, for the greater part of its length, lies wholly within the State of Washington, and very shortly below the mouth of the Snake the Columbia is the boundary between the States of Washington and Oregon. Prior to the great enterprise which has been the cause of these cases being before this Tribunal, sporadic improvement extending over many years had been

visited upon the Columbia River. Most of that work was done by the United States for the improvement of navigation. This project was first investigated in 1903 by the Bureau of Reclamation. In 1918 agitation for a thorough study of the project was renewed, and in 1919 and 1920 the Columbia Basin Commission of the State of Washington made the first real survey. Subsequent reports were made from time to time, and finally in 1929 the War Department, acting through a corps of engineers, began an exhaustive investigation of the uses of the Columbia River, including a study of the Columbia Basin project. In July, 1931, the District Engineer of that corps made his report to the Chief of Engineers of the War Department, in which he found the Columbia Basin project to be a feasible one, and the Chief of Engineers on March 29, 1932, recommended to the Secretary of War a comprehensive plan for the development of the Columbia River to consist of ten dams, including power dams located at Grand Coulee and other places, which would make the River navigable and develop forty-two billion kilowatt-hours annually, or approximately one-third of the total electric power produced in the United States in 1930.

On June 8, 1933, Harold L. Ickes was appointed to the office of permanent Administrator of Public Works. Thereafter the President of the United States, under authority of the National Industrial Recovery Act and particularly by virtue of Sections 201, 202 and 203 of said Act, directed the Administrator of Public Works to include in the Public Works program, enumerated in and contemplated under Section 202, the Grand Coulee Dam and Power Plant of the State of Washington as a part of the Columbia River project in such State.

The project finally recommended by the War Department and the Department of the Interior contemplated among others the following features:

(a) The Dam across the Columbia River at the Grand Coulee, State of Washington, to be 370 feet high above low

water and 4,290 feet long on the crest and to contain eleven million cubic yards of concrete. (The Dam as actually constructed will be 550 feet high.)

(b) The power plant installed to develop 2,100,000 Horse Power; greater than the combined developments of either Niagara Falls or Boulder Dam.

(c) The total cost of the project to be $392,000,000.

The Grand Coulee Dam is the key dam on the Columbia River and will create a lake 150 miles long, reaching the Canadian boundary. By drawing down the reservoir thus created to a depth of eighty feet in the wintertime, when the flow of the Columbia is at its lowest, over five million acre feet of storage becomes available, which release will double the prime power of the Columbia River downstream to the Snake River and add more than 50% to the power of the Columbia below the Snake. The storage afforded by the Grand Coulee Dam will have an appreciable effect on reducing floods on the whole River. There will be 905,500 acres of first-class land available for irrigation.

On November 1, 1933, the Secretary of the Interior signed a memorandum addressed to himself as Federal Emergency Administrator of Public Works, in which, as the Second Report of the Columbia Basin Commission (No. 7, Pltffs.' Exh. E, p. 14) states, "After reciting that it was evidently the intention of the Public Works Administration to make the construction of the Grand Coulee Project a Federal project * * *, the Secretary recommended that the project be considered a Federal project to be constructed, operated and maintained by the Bureau of Reclamation."

On December 12, 1933, the Secretary of the Interior and Federal Emergency Administrator of Public Works signed "an amended Declaration of Taking in the case of the United States of America versus Continental Land Company, et al., in which he stated that certain lands at the Grand Coulee Damsite to the extent of 840.28 acres

'are hereby taken for the use of the United States' in the construction of a dam at the Grand Coulee Damsite for the regulation and control of the flow of the Columbia River, for a storage reservoir from the damsite to the Canadian Boundary, for the improvement of navigation, for flood control, etc. * * *." That Declaration was filed on December 19, 1933, in the United States District Court for the Eastern District of Washington, Northern Division, and as a result the United States immediately acquired the title and possession of part of the lands involved. (No. 7, Pltffs.' Exh. E, pp. 14, 15). Similar Declarations later filed resulted in further acquisitions.

On January 4, 1934, Senator Dill announced that Public Works Administrator Ickes had informed him on that date that the Grand Coulee Project had formally and officially been declared a Federal project by resolution of the Public Works Administration, and henceforth would be carried forward wholly on that basis. (No. 7, Pltffs.' Exh. E, p. 15.)

On January 4, 1934, the First Assistant Secretary of the Interior signed a notice addressed to the Commissioner of Public Lands of the State of Washington giving notice that the United States intended to make examinations and surveys for the utilization of the waters of the Columbia River and its tributaries in the development of the proposed Columbia Basin Project, and attached to said notice a list of lands owned by the State of Washington required for the construction of the Grand Coulee high dam, which notice was given pursuant to Sections 7410, 7411, 7412 and 7413 of Remington's Revised Statutes of Washington, and was filed immediately thereafter with the Commissioner of Public Lands of the State of Washington.

And finally, the project received the express approval of Congress by the Act of Aug. 30, 1935, c. 831, 49 Stat. 1028 (quoted in Govt. Brief, p. 91).

Shortly after the inclusion of the Grand Coulee Project in the Public Works program, the Department of the In-

terior prepared Specifications No. 570 for the construction of a part of the work thereon and called for bids for such work. Among others, the appellants, Silas Mason Company, Inc., Walsh Construction Company, and Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, copartners as Atkinson-Kier Company, bid on the work and their bid was accepted (No. 7, R. 88; Pltffs.' Exh. A).

On July 16, 1934, a contract (No. 7, Pltffs.' Exh. A) was duly entered into by the United States of America and appellants (other than Mason-Walsh-Atkinson-Kier Company), whereby they agreed to furnish labor and materials and to perform all work required for the construction of that part of the Grand Coulee Dam and Power Plant as covered by Items 1 to 85, inclusive, of the schedule of Specifications 570, for the Columbia Basin Project, and were to receive $29,339,301.50 as a consideration for the performance of the work and for such labor and materials supplied.

This contract contained a number of specifications under which, among other things, the United States undertook and agreed to furnish a large part of materials necessary for the construction of the Dam and Power Plant, and the contractor to supply the remainder of such materials and perform all work essential for its construction.

The contract gave the Government the right to terminate it at any time prior to the completion of the Grand Coulee Dam to its full height. But, in that event, the contractor was to turn over to the Government all its plants, tools, etc., and the Government was obligated to pay to the contractor the total actual cost less revenues from rentals, leases and concessions to the date of such termination, plus 10% of such total cost. (No. 7, R. 11.)

Among the many obligations imposed upon the contractor were:

> The construction, maintenance and operation of office and headquarter buildings, warehouses, garages, commissary, hospital, dormitories, boarding houses

and homes for employees, upon a tract of land designated by the Government, all subject to the approval of the contracting officer (Federal Officer in charge). (No. 7, Pltffs.' Exh. B, Spec. 35.)

The grading, surfacing and maintenance of the streets in the camp site, as in the opinion of the contracting officer may be required to provide for safe and satisfactory use by the public. (Spec. 35.)

The construction, operation and maintenance of a complete water system in order to supply the camp site with water for domestic, fire protection and irrigation purposes, all subject to the approval of the contracting officer. (Spec. 37.)

The construction, operation and maintenance of a complete sewer system, subject to the approval of the contracting officer. The method of discharge of the sewers into the Columbia River to conform to the laws and regulations of the Health Department of the State of Washington, but the point of discharge to be subject to the approval of the contracting officer. (Spec. 38.)

Any leases of space in buildings erected and owned by the contractor, subject to the approval of the contracting officer, such leases to contain provisions making them subject to termination if, in the opinion of the contracting officer, the lessee should be guilty of misconduct or infraction of the law. (Spec. 39.)

The contractor to make all necessary arrangements with the proper State and County authorities for school facilities and instruction for the families of the contractor's employees and other residents in the camp site, to be furnished without charge and subject to the approval of the contracting officer. (Spec. 42.)

Police protection for the contractor's camp for the area involved in and surrounding the construction work covered by the specifications to be furnished by the Washington State Patrol in cooperation with the Government. The contractor, however, was to provide and maintain, without charge therefor, such jail facilities satisfactory to the Washington State Patrol as may be required and to cooperate with the Washington State Patrol and the Government in the maintenance of law and order. (Spec. 43.)

The specifications provided further:

> "The contractor may, with the consent of the contracting officer, use * * * any land which is the property of the Government." (Spec. 45).
>
> That a railroad would be constructed by the Government and, when completed, it was to be turned over to the contractor who was to assume its operation and maintenance. All operations of the contractor in connection with the railroad were to be subject to the approval of the contracting officer. (Spec. 51.)

As each of appellants who signed that contract had no prior business connection or interrelation with the other save that the three organizations made a joint bid for the Grand Coulee Dam, it became necessary to create a joint agency to carry on the work in their behalf. To that end, the signatories caused to be organized the appellant, Mason-Walsh-Atkinson-Kier Company, as a Delaware corporation and entered into a contract with it, employing it as their agent to perform the contract with the United States. (No. 7, R. 35-38.)

On December 30, 1933, appellant, David H. Ryan, entered into a contract with the Department of Interior for the excavation of the over-burden at Columbia River Damsite. He began performance of the work under that contract about January 1, 1934 and completed it in the summer of that year. During the entire performance of the work appellant maintained his office and living quarters within the territory of the Grand Coulee Project.

The title to all of the land upon which all of the work was performed by appellant Ryan under that contract had either been acquired by the United States Government by deed prior to the commencement of any work by plaintiff or was being acquired by condemnation proceedings. All of the land on that project upon which appellant's work was done was above the high water mark of the Columbia River and was necessary for and was actually to be used by the United

States Government in the construction of said Project. (No. 8, R. 9.)

On September 1, 1934, appellant, Ryan, entered into a further contract with the Department of the Interior of the United States Government for the construction of a railroad (Spec. No. 572) connecting with the Northern Pacific Railway Company tracks at Odair, Washington and running to the site of the Grand Coulee Dam. The title to all of the lands upon which the construction work under that contract was performed by Ryan, had been acquired for governmental purposes by purchase or condemnation by the United States Government and the entire performance of the contract by Ryan was had upon those lands so acquired. (No. 8, R. 15.)

The lands with which these cases deal consist of

1. Land acquired by the United States through condemnation and conveyance.

2. The river bed or lands below high water mark upon which the foundation for the dam is being constructed.

3. School Lands (occupied by the Government for its own engineers' camp, and traversed by its railroad).

4. Indian tribal lands.

The lands in the first category were acquired with the consent of the State. Those in categories 2 and 3 were acquired by grant from the State of Washington pursuant to Sections 7410, 7411, and 7412 of Remington's Revised Statutes and all these, together with the Indian tribal lands, were set apart by the United States for the use of this project; over all of them, as we contend, the State of Washington has effectively ceded to the United States its full jurisdiction.

SUMMARY OF ARGUMENT.

I.

A. The United States acquired exclusive jurisdiction over so much of the area constituting the Grand Coulee Project as was acquired by it by condemnation or deed.

B. The jurisdiction of the United States was likewise exclusive as to all of the area constituting the Grand Coulee Project that was ceded to it by the State of Washington.

II.

A. On the question of the immunity from State taxation of the gross income received from the United States as compensation for contractual performance, this brief first presents the proposition that the position taken by the Government involves the most sweeping and radical departure from accepted constitutional principle that has been urged upon the Court.

B. No difference in the principle governing bargaining between the government and a private person is perceived, whether the government is seeking to obtain supplies, to negotiate a lease, to secure a loan of money, to obtain services, or to secure performance of a more complicated undertaking. The direct and complete analogy between "a contract for the loan of money" and a contract for future payment of supplies with the contracts in the cases at bar is stressed.

C. Appellants suggest that mere convenience in the administration of the revenue is not sufficient to justify the hazards consequent upon so violent a change in the Constitution or that such a change ought to be by the consent of the people—in other words, by an amendment to the Constitution.

ARGUMENT.

I.

The Exclusive Jurisdiction of the United States.

Inasmuch as it has been established by this Court in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, and by the Supreme Court of the State of Washington in *Concessions Co.* v. *Morris,* 109 Wash. 46, 186 Pac. 655 (Sup. Ct. Wash. 1919) that a state is without power to tax non-residents engaged in business on lands over which the Federal Government has exclusive jurisdiction, and inasmuch as this proposition is not disputed either by the State of Washington or by the Attorney General of the United States* (Govt. Brief, p. 6), this portion of our brief will be addressed to the contention that the Federal Government has exclusive jurisdiction over the lands on which the Appellants were engaged in the construction of the Grand Coulee Dam.

The area of controversy between the appellants and the Government on this question is greatly narrowed by the Government Brief. Thus the Government concedes that the acquisition of lands by the United States under Article I, Section 8, Clause 17 of the Constitution, with the unqualified consent of the State, "normally" vests in Congress exclusive authority over those lands so purchased. It concedes also that the acquisition of lands under an act passed by the State, ceding to the United States jurisdiction over the lands acquired, gives to the United States exclusive jurisdiction, unless the act of cession by its terms reserves jurisdiction in the State or qualifies the jurisdiction granted to the United States.

The Government and the appellants are at one in claiming that dams erected in navigable streams for the improvement of navigation are "needful Buildings" within the meaning

* For the sake of brevity, the brief submitted by the Attorney General of the United States as *Amicus Curiae* will be referred to herein as the "Government Brief."

of Article I, Section 8, Clause 17 of the Constitution and that a railroad built for the purpose of aiding in such construction is in the same category. They are structures erected for Federal purposes.* It is conceded that within the meaning of the Constitution lands which are taken by process of eminent domain are "lands purchased." It is also conceded that in a "normal" case, i. e., a case in which there is no express Congressional act to the contrary, the acceptance of jurisdiction over lands so purchased or condemned is to be presumed.

But these principles having been agreed upon, the Government goes on to argue that acceptance on the part of the United States is necessary to the vesting of such exclusive jurisdiction, not only where it acquires exclusive jurisdiction over lands by act of cession of the State, but also where it acquires such exclusive jurisdiction by operation of the Constitution; that acceptance or non-acceptance may be deduced merely from the "surrounding circumstances"; and that in the cases at bar acceptance is negatived by certain aspects of the construction contracts entered into between the appellants and the Department of the Interior, acting on behalf of the United States. With this contention, we cannot agree.

In treating this problem, it will be helpful to divide the lands on which the appellants were engaged in the performance of their contracts with the Federal Government into two groups: First, those lands which were acquired by purchase, which comprise the major portion of the area on which the appellants were engaged, and, second, the lands which were acquired by grant through operation of the statutes of Washington (Remington's Revised Statutes, Sections 7410-7412) and the Indian tribal lands.

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* To the case of *United States* v. *Tucker*, 122 Fed. 518, cited and relied on, both by the Government and by the appellants, may be added *Reddall* v. *Bryan*, 14 Md. 444, 74 Am. Dec. 550, appeal dismissed, 24 How. 420.

Cases in support of the other agreed principles are adequately collated in the brief of the Government and the briefs heretofore filed.

The United States Acquired Exclusive Jurisdiction of so Much of the Area Constituting the Grand Coulee Project as Was Acquired by it by Condemnation or Deed

It is established beyond question that where land is purchased by the Federal Government with consent of the State wherein the land is located, exclusive jurisdiction thereover *ipso facto* vests in the Federal Government by operation of Clause 17, Section 8 of Article I of the Federal Constitution.

Mr. Justice STORY, at circuit, was one of the first to recognize that this clause of the Constitution operates to transfer *ipso facto* exclusive jurisdiction from the State to the United States where lands have been acquired by the latter with the consent of the State. In *United States* v. *Cornell,* 25 Fed. Cas. No. 14,867, at page 648, he said:

> "When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased *by the very terms of the constitution* ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted."*

This statement of Mr. Justice STORY was quoted and relied upon by this Court in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 654. "The question," said the Court, "is not an open one." See also *United States* v. *Unzeuta,* 281 U. S. 138, 142.

The opinions of the Attorney General have followed this doctrine. In 7 Op. A. G. 629, the then acting Attorney General, Honorable Caleb Cushing, spoke as follows:

> "Now, it is thoroughly settled, by numerous adjudications, that all such Federal jurisdiction, as the Constitution contemplates, is acquired by the United States, in the mere consent of the State to the purchase; and that upon such consent, the jurisdiction

* Italics supplied unless otherwise noted.

of the State ceases, and that of Congress comes in by virtue of the Constitution."

This we believe to have been the uniform opinion of judicial tribunals and attorneys general. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 532; 6 Op. A. G. 577.

Consent* to the purchase of these lands by the Federal Government was given by an Act of the Legislature of the State of Washington (Laws 1891, p. 31) (Remington's Revised Statutes, § 8108), as set forth in Appendix A on page 115 of the Government's brief.

In support of its contention that in addition some form of acceptance is essential to the vesting of Federal jurisdiction, the Government turns to the first part of Clause 17, Section 8, of Article I and points to the requirement of express acceptance that applies to lands intended to form the seat of government. The omission of a like provision in the second part of the Clause is said to mean no more than that no express acceptance is necessary where lands are purchased by consent from a state for Federal purposes. The argument, if it proves anything, proves too much. The historic reasons which made it necessary to provide for

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* Appellee, the State of Washington, on page 35 of its brief contends that the State of Washington never consented to the purchase of these lands by the Federal Government, and that therefore the automatic vesting of exclusive jurisdiction thereover did not follow. Counsel support this baseless contention by reference to the Laws of Washington for 1889-90, page 459, wherein it is provided that a description by metes and bounds must be filed as a condition of the State of Washington's consent to the Federal Government's purchasing lands within the State. It is submitted that counsel for the State of Washington are in error in applying this Statute to the lands involved in this case. The Act which they seek to apply has been superseded by that of the following year (Laws of Washington for 1891, p. 31) (Remington's Revised Statutes, § 8108), referring to lands purchased by the Federal Government for dams, etc. Proof of this lies in the fact that the Statute which counsel of the State of Washington seek to apply is no longer printed in the Code of that State, having been replaced by Section 8108. The case of *Pothier* v. *Rodman,* 291 Fed. 318, which counsel cite and quote from to support their contention of the applicability of this Statute is misleading, for in that case an Act was expressly passed by the State of Washington consenting to the purchase of the lands involved. In that Statute there was a specific proviso for the filing of a map as a condition to its consent. Thus while the Statute was similar to that superseded by Section 8108, it in no way proves that the former is still in force.

an acceptance by Congress of lands designed for the seat of the new government are well known. So vital a decision could not be left to the granting states alone. The transfer of jurisdiction over lands contemplated by the second part of the Clause, where the United States itself was to initiate the transaction and the states merely to consent, might well have been considered to be self-executing in character.

Speaking of this consent, Mr. Justice MILLER, in *Ex parte Hebard,* 11 Fed. Cas. No. 6,312, says (p. 1011):

> "The consent of the state being necessary for no other purpose than that of plenary jurisdiction in the Federal Government, it is consent to this which is provided for in the Constitution. This consent may be given whether the land is purchased in the common meaning of that word or not and may be given either before or after title is acquired by the United States. The elements necessary to render valid this consent to the exercise of federal jurisdiction are title in the United States and possession for one of the purposes mentioned in the Constitution."

To these elements the Government's brief would add a third, namely, acceptance on the part of the United States. The brief contains no definition of the action necessary to manifest this acceptance, nor does it state whether the acts of the administrative branch of the government are sufficient alone to manifest acceptance or non-acceptance. We do not understand, however, that the Government challenges the ultimate control of Congress over any acquisition or surrender of public lands or of Federal sovereignty over them. Neither do we understand the Government to press for some sort of acceptance in express words.

It is true that jurisdiction cannot be forced upon the Federal Government nor upon any other sovereign against its will, but where land is acquired under Clause 17, Section 8, Article I of the Constitution, a willingness to assume the jurisdiction which the Constitution contemplates is implicit

in the decision to acquire. The consequences that follow on the purchase are inseparable from the purchase itself.

On the other hand, where there is a cession of jurisdiction over lands or territory by a state as distinct from the consent provided by Clause 17, the state no doubt may qualify its cession in any way not inconsistent with the Federal use. No doubt, also, by analogy to the canons of international law, such an independent cession requires an acceptance by the United States. But even so, as the Government Brief states (p. 80):

> "Generally, of course, jurisdiction over areas acquired for governmental purposes is beneficial to the United States. Acceptance by the United States of a cession therefor may normally be presumed."

In this the Government recognizes, though it would seek to qualify, the principle stated by Mr. Justice FIELD in *Fort Leavenworth R. R. Company* v. *Lowe* (114 U. S. 525, 528):

> "As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part."

Or, as Mr. Justice MILLER phrased it in *Ex parte Hebard*, 11 Fed. Cas. No. 6,312 (p. 1011):

> "It is also urged that some act of Congress assuming this jurisdiction is necessary, even if the statute of Kansas be valid; but I am of opinion that when the locus in quo is under the control of the United States and is used as a fort, magazine or other purpose mentioned in the constitution, the laws of the United States, framed for such places, become the law of these places upon the consent of the state lawfully given for that purpose."

The Government Brief says (p. 83):

> "Normally exclusive jurisdiction may be passed to the United States whether or not there be an express acceptance."

If express acceptance is unnecessary, what is the significant act that gives rise to an implied acceptance? An examination of the authorities cited by us will disclose that in every case it was the ownership or acquisition of land by the United States for the purposes prescribed by the Statute of Cession that accepted the state's offer of jurisdiction and effected its transfer.

Furthermore, the Washington Statute of Cession, no different in this respect from other state Statutes of Cession, manifestly contemplates that the ceded jurisdiction shall pass when the United States acquires or sets apart land for a purpose enumerated therein. The significant portion of that statute reads:

> "* * * the jurisdiction of this State is hereby ceded to the United States of America over all such lands or lands as may * * * be hereafter acquired by purchase or condemnation, or set apart by the general Government for any or either of the purposes before mentioned."

Thus the purchase of private lands or the setting aside of public lands is the indispensable, and the only, act required by the state for the federal government to signify acceptance of its proffer of cession and of exclusive jurisdiction.

The unqualified character of the cession made by the State of Washington should be noted. The Cession Act (Remington's Revised Statutes, § 8108) cedes to the United States "the jurisdiction of this State." The phrase is all-embracing. There is no reservation whatever save in the "sanctuary" clause, which reserves the right to serve civil and criminal process within the lands acquired or set apart by the United States. Yet even this process is only that related to "crimes committed or for any cause of action or suit accruing *without the bounds* of any such tract." The language in which this reservation is couched and its deliberately limited scope are eloquent of an intent on the part of the state to withdraw its power. We submit that there is

no showing whatever of any contrary understanding or attitude on the part of the United States.

The entire theory of the Government on the question of non-acceptance of jurisdiction over the Grand Coulee Dam area seems to be based upon certain portions of the contract made by administrative officers on behalf of the United States with the appellants, or rather upon selected items of the specifications which are annexed to the contract proper and which form a part of it. These specifications the Government Brief seeks to exalt into the dignity of a Congressional Act by reason of the Act of Congress of August 30, 1935 (49 Stat. 1028) which, after authorizing and adopting the Parker Dam and Grand Coulee Dam projects, declares that "all contracts and agreements which have been executed in connection therewith are hereby validated and ratified."* It strains and exaggerates this language to treat a mere blanket ratification of these pre-existing contracts, all and sundry, as a definition by Congress of the territorial jurisdiction it was ready to accept. Jurisdiction is a solemn matter. Rights and liberties, the respective duties of the state and nation, depend upon its accurate delineation. Surely it should not be, surely it was never meant to be left to doubtful inferences from "surrounding circumstances" or the language employed in miscellaneous construction contracts with private citizens.

When we turn to the contract, however, it seems to us that, instead of showing a non-acceptance of exclusive jurisdiction over the lands by the Federal Government, it indi-

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* Doubtless this Act of ratification was intended to comply with Section 9 of the Act of March 3, 1899 (33 U. S. C. § 401) and had no other purpose. See *United States* v. *Arizona*, 295 U. S. 174.

Moreover, if Congress had intended not to have the Federal Government exercise that exclusive jurisdiction, it would have been a simple matter for Congress to have so provided. For example, in each of the following statutes Congress, by specific words, retroceded jurisdiction or some part thereof: Act of June 29, 1936, 49 Stat. 2025, Sec. 1; Section 13(b) of the Act of September 1, 1937, known as "The Housing Act"; Act of March 1, 1911, c. 186, 36 Stat. 963, Sec. 12, 16 U. S. C. Sec. 480 (National Forests) and Act of February 18, 1929, 45 Stat. 1224, 16 U. S. C. Sec. 715g (Migratory Bird Reservations). See, also, 20 Op. A. G. 611, 613.

cates (if it can be taken to speak at all on the subject) a clear recognition of the sovereignty which the United States has assumed. The contract for the construction of the Grand Coulee Dam with Silas Mason, Inc., and others is filed with the Court as Plaintiff's Exhibit A. The specifications on which the bids were submitted and the contract let are included by reference and are also filed, No. 7, Plaintiff's Exhibit B. In these specifications it is definitely provided that the contracting officer (the Federal official in charge) would establish police rules and regulations for all forces employed under the contract, and that if the contractor failed to enforce these rules, the contracting officer might enforce them at the expense of the contractor (Spec. 9); that the contractor was to provide such streets in the camp site as the contracting officer considered necessary for safe and satisfactory use of the public (Spec. 35); that the design and maintenance of the water supply, sewage and sanitation systems were to be subject to the approval of the contracting officer (Spec. 38); that the contracting officer could determine what sort of business should lease space in the contractor's buildings (Spec. 39); that liquor and gambling concessions were forbidden (Spec. 39); that the rates to be charged for meals and lodging were to be prescribed (Spec. 40); that the contractor was to furnish without charge and by arrangement with the state authorities school facilities and instruction, but subject in all respects to the approval of the contracting officer (Spec. 42); and finally that the contractor was required to provide jail facilities and to cooperate in the maintenance of law and order (Spec. 43). All of these things are matters which might have been made the subject of legislation by the Federal Government as sovereign over the territory. They indicate the duties which the Federal Government was prepared to assume.

On page 93 of its brief, the Government, with "no desire to minimize the rather wide scope of these specifications,"

brushes them aside with the comment that each is of temporary duration only and that when the contract is completed these obligations vanish. Conceding this to be true, the same thing may be said for those clauses of the contract on which the Government relies as evidencing the concurrent jurisdiction of the state. When the contract is performed, it is over for all purposes, so far at least as the contractor is concerned. Indeed the contract may end without full performance by reason of the right which the Government retained to terminate it. The compliance with state laws which is exacted from the contractor is no less transitory than his compliance with the regulations imposed by the Federal officials.

The specifications which the Government (Br., p. 94) treats as giving to the State of Washington powers "apparently superior to the control of the Federal Government" are the following: The provision that the contractor must comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance and operation of the operator's camp (Section 35); that the discharge of sewage into the Columbia River shall conform to the laws and regulations of the Department of Health of the State of Washington; that the contractor shall make arrangements with the state for school facilities and instruction (Spec. 42); and that police protection shall be furnished by the Washington State Patrol in cooperation with the Government (Spec. 43).

Giving to these specifications, for the sake of argument only, that exaggerated importance which the Government ascribes to them, treating them in short as solemn acts of the United States interpreting its own powers, they still seem to be in no way irreconcilable with its exclusive jurisdiction. It is familiar doctrine that upon the transfer of territory by conquest or cession, laws regulating the conduct of individuals remain in force until altered by the newly created

power (*American Insurance Company* v. *Canter*, 1 Pet. 512, 542; *Chicago & Pacific Railway* v. *McGlinn*, 114 U. S. 542). Indeed, insofar as any penal laws of the State of Washington are concerned they are gathered into the Federal jurisprudence and made enforceable by Federal authorities by the express provisions of the Criminal Code (U. S. Code, Title 18, § 468). Doubtless the laws of the state relating to such subjects as the building, maintenance and operation of the contractor's camp, the discharge of sewage, and the disposal of garbage and refuse fall within this category. The entrance into the area by the state and county authorities for purposes of education is solely by reason of arrangements which the contractor is to make subject to the approval of the contracting officer, a Federal official. The services which the Washington State Police are to give in the maintenance of law and order are to be rendered in cooperation with the Government and manifestly by its permission. None of these things evidence any surrender whatever of national sovereignty.

Moreover if these provisions of the contract can be tortured into a withdrawal by the Federal Government of any part of its jurisdiction over the area, which we deny, they cannot be broadened beyond their terms. None of them—nor all of them together— makes of the United States a subordinate sovereign, nor do they invite the entrance of the legislative or taxing power of the state.

But the short answer to the position of the Government in this regard is that the contract and the specifications are conventional agreements between the United States and private contractors. They are not statutes. They are not the result of any negotiations between the United States and the State of Washington. They merely set up standards—standards borrowed in part from the existing laws of the State of Washington, it is true,—to which the conduct of the contractors is required to conform. No penalties other than those attendant upon a breach of contract are

fixed for their disobedience. No power of enforcement is committed to the state. It is wholly specious to regard them as a definition of the power of the nation over the Coulee Dam area. We heartily agree with the Government (Br., p. 96) that "the question of whether or not the United States has accepted exclusive jurisdiction is not to be solved by weighing the respective extent of state and Federal jurisdiction exercised during the construction [sic] of the contract." Exclusive jurisdiction does not flit lightly from one sovereign to another and back again. It requires something more solemn than ephemeral contracts to fix its residence.

Stress is laid upon the fact that trials and convictions have been had within the area by a justice of the peace appointed by a county of the state. If the State of Washington had reserved the power to appoint such officers for service within the Federal area, questions might have arisen which are not present here. It may be that the principle on which Mr. Justice STORY decided the case of *United States* v. *Cornell,* 25 Fed. Cas. No. 14,867 would be broad enough to permit such a reservation without impairing the exclusive jurisdiction invested in the United States. Said Mr. Justice STORY (p. 649):

> "Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state, in such cases, to execute its processes within its limits. And a cession, of exclusive jurisdiction, may well be made with the reservation of a right of this nature, which then operates only as a condition annexed to the cession and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process."

It may well be held that in permitting the state authorities to assist in the maintenance of law and order on land over which it has exclusive jurisdiction, the Federal Government is permitting their acts as *quoad hoc* its own. But it must

not be overlooked that no such condition was annexed to the consent which the State of Washington gave to the vesting of exclusive jurisdiction in the Federal Government. The fact that a justice of the peace appointed by a county of the State of Washington has conducted trials resulting in convictions cannot of itself establish the existence of jurisdiction in the state by which he was appointed. Indeed, if, as we contend, the Federal Government has acquired exclusive jurisdiction over the area, judgments rendered by this justice of the peace were entirely void. (*In re Ladd*, 74 Fed. 31, Circuit Court, District of Nebraska, 1896.)

In summary, it is the position of the appellants that exclusive jurisdiction over the lands acquired by the Federal Government by purchase or condemnation vested in the Federal Government *ipso facto* upon their acquisition with the consent of the state; that no further acts were necessary by either sovereign to effect this result; that any contract entered into thereafter by either with private individuals did not affect the governmental relationship previously established; and that the contract here involved is indicative of recognition by the Federal Government of its exclusive legislative authority rather than any qualification of acceptance on its part.

Finally, the Government Brief (p. 86) expresses some apprehension lest the power of the United States to acquire property "might be more or less seriously curtailed" if it were held that despite the desire or intention of the United States, jurisdiction necessarily passed upon the mere acquisition of property in consenting States. How the legal consequences of acquisition are to lessen the power to acquire, is not easily understandable, unless the suggestion is that the States, dreading the coming of "federal islands" (p. 84) in their midst, may repeal their statutes of consent. But, after all, the States and the nation are not foreign powers vis-a-vis one another. They may arrange matters between themselves as they choose. There can be no question of the

power of the United States to retrocede to the States any exclusive jurisdiction which it may acquire under Clause 17. Unless, indeed, all the land is to be bought once more for Pharaoh, there would seem little more reason to apprehend inconvenience from the operation of that Clause in the future than in the past. The supreme inconvenience would be to leave the question of jurisdiction unsettled by any fixed rule, but deducible only from "surrounding circumstances."

The Jurisdiction of the United States is Similarly Exclusive Over the Lands Title to Which Was Granted by the State as Well as the Indian Tribal Lands.

Turning now to the residue of the area constituting the Grand Coulee Dam Site, it will be recalled that these lands are those lying below the high water mark of the Columbia River, school lands, and the Indian tribal lands. Title to the lands lying below the high water mark of the Columbia River passed to the Federal Government by grant through the operation of Sections 7410, 7411, and 7412 of Remington's Revised Statutes of Washington. We quote the granting clause of Section 7411:

> "The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works."

It is urged by the Federal Government that this is not a title acquired by purchase within the meaning of Clause 17, Section 8, Article I and that, therefore, exclusive jurisdiction in the United States must follow as the result of legislative cession rather than mere consent. That such a

cession has occurred, however, the Government concedes (Br., p. 104):

> "The United States would, we believe, have exclusive jurisdiction over the river bed. The Washington statute would seem to pass a title sufficient to support a cession of jurisdiction (at least where the land will be permanently used by the United States), even though it is insufficient to constitute a purchase under Clause 17."

As respects the School Lands it is contended that the United States did not acquire exclusive jurisdiction to these lands for the reason that the legislature of the State of Washington, when it granted to the United States the consent of the state to acquire by purchase or condemnation land from individuals or bodies politic within the state, did not intend this consent to apply to a purchase of lands from the state itself. The basis for this contention is found in the case of *State ex rel. Bussell* v. *Callvert* (33 Wash. 380). That case, however, has no relevance to the question here presented. It dealt with a statute giving to the United States a mere use of certain tide lands, which was properly characterized by the Court as a mere easement that terminated under the express words of the statute whenever the use ended. It was decided in December, 1903, two years prior to the passage of Sections 7410, 7411, and 7412 which were enacted in 1905. These sections are widely different in purpose and in scope from the Act involved in the *Callvert* case. They grant the land itself without any defeasance clause whatsoever.

Furthermore, it should not be overlooked that these School Lands were occupied by the United States for its camp of engineers and its railroad. So conclusive was the exclusive jurisdiction of the Federal Government to these lands that the Supreme Court of the State of Washington did not consider them in its opinion.

The record establishes that the Secretary of the Interior,

on behalf of the United States, has duly filed with the state's Commission of Public Lands the notice providing for by Section 7410 and the description of the land required by Section 7412.*

As for the Indian tribal lands, it will be noted that title to these lands was originally in the United States for the benefit of the Indians on the Colville Reservation. (See Executive Order of July 2, 1872.) Title to these lands having always been in the United States, it follows that the property could not have been acquired by purchase under Clause 17. (*Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525). But as to the river bed, School Lands, and the Indian tribal lands alike, all of them are lands "set apart" by the general government for the purposes recited in Section 8108. And over all of them the State of Washington has ceded its jurisdiction by that statute, and the United States has accepted the cession.

II.

Tax Immunity.

With respect to its discussion of tax immunity, the brief of the Government presents a question utterly new. Originally our task was confined to throwing into a strong light the direct and complete analogy between the

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* The Second Report of the Columbia Basin Commission (No. 7, Pltffs.' Exh. E, R. 89) states at page 15:

> "(k) **United States Reserves State Lands and Water for Project.** On January 4, 1934, Mr. T. A. Walters, First Assistant Secretary of the Interior, signed a notice addressed to the Commissioner of Public Lands of the State of Washington, giving notice that the United States intended to make examinations and surveys for the utilization of the waters of the Columbia River and its tributaries in the development of the proposed Columbia Basin project and filed with said notice a list of lands owned by the State of Washington required for the construction of the Grand Coulee high dam. This notice, given pursuant to Sections 7410, 7414, 7412 and 7413 of Remington's Revised Statutes of Washington, was filed immediately thereafter with the Commissioner of Public Lands of the State of Washington, and shortly afterward, in pursuance of the same statutes, a similar notice reserving from appropriation the waters of the Columbia River for the Columbia Basin Project was filed with the Commissioner of Public Lands by the Secretary of the Interior."

cases at bar and the cases expounding the principle of federal immunity from interference by the states. Contrariwise, the sole attempt of the State was to endeavor as best it could to show that our cases displayed some distinguishing mark that kept them beyond the pale. Both sides regarded the decisions of this Court, extending over a century, as controlling the application of the principle.

Differing from the State, the brief of the Government attempts no vain task of distinguishment. Marked no less by disarming candor than ability, it frankly admits that the cases at bar cannot be distinguished from the earlier cases. The bold expedient of drastically curtailing, if not abolishing, the whole doctrine of federal immunity is consequently proposed. This calls for the overruling, not merely of the three cases marked for extinction by the Government Brief, but of the many cases which apply the principle. Counsel of such high standards of frankness and fairness will not deny that as fast as cases identical with earlier cases on the facts come before this Court, the precedents which generations at the bar have considered as the expression of the fundamental law must be set aside. That this will be the gravest and most sweeping departure ever contemplated by any member of this Court, or by responsible counsel, is likewise too plain for argument.

Nevertheless, since counsel of such eminence and official standing propose it, we are constrained to the analysis of this breath-taking proposal. It is true that in late years members of this Court in vigorous dissenting opinions have criticized the extent of the doctrine of federal immunity. A recent example is *Brush* v. *Commissioner of Internal Revenue,* 300 U. S. 352, in which the dissenting opinion suggests that the limitations on the reciprocal powers of the nation and the states to tax be rephrased thus (p. 375):

> "• • • that the exactions of the one must not discriminate against the means and instrumentalities

> of the other, and must not *directly burden* the operations of that other."

The latter half of the rule is further defined in the following language:

> "* * * an exaction * * * infringes the principle of immunity * * * if the burden of the tax be palpable and direct rather than hypothetic and remote."

But the Government Brief asks more than this. Even though the burden of the tax is palpable and direct, still counsel suggest that it be sustained so long as it does not discriminate. The only limitation, then, which is suggested is that such taxes must not discriminate. This is an attack upon a whole body of precedents built up with such painstaking care throughout the years, far wider in scope and necessary consequence than anything ever suggested.

It will be borne in mind that no occasion arises in the cases at bar to examine into the doctrine of reciprocal immunities. We are here concerned only with the unilateral rule that federal activities cannot be taxed by the states. We feel warranted, therefore, in deducing that the criticism of the doctrine of intergovernmental tax immunity is intended to give notice that the entire doctrine as applied by the cases from the beginning is suspect and will be attacked as occasions shall arise.

It is true that the Government Brief contents itself with asking at this time that only *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *U. S.,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, be overruled. But at no point in its brief is the argument of the Government confined to these three cases. It ranges over the whole body of the doctrine of federal immunity, of which these three cases are but a minor part. No means of distinguishing the reasoning of these three cases from the rea-

soning employed in the cases cited in the margin, is suggested.*

Indeed, in very recently seeking to sustain the doctrine of federal immunity in *Graves* v. *Texas Co.*, 298 U. S. 393, the Government in its brief in that case, while then represented by the same counsel as here appear, successfully urged that the *Panhandle Oil* and *Indian Motocycle* cases were a part of the seamless robe of constitutional doctrine that sustained their position. While we do not in the slightest challenge the propriety of such a complete reversal of position as is here exhibited by the Government, wherever it may deem that its interests so require, nevertheless we do say, without fear that the learned counsel for the Government will contend to the contrary, that *all* of the cases here referred to by us, are equally under the condemnation of their argument.

And, since the principal objection to the doctrine of federal immunity as thus attacked by the Government is the introduction of "an extraordinarily large amount * * * of practical contradictions into the body of constitutional law," (Br. p. 17) we are not permitted to suppose that the Government will rest content until all of the cases are overruled that fall under the reproach of the new principle it invokes. Otherwise, by merely overruling the three cases, the Court will succeed only in introducing one more of the "practical contradictions" which have incurred the displeasure of the Government.

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* McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of United States, 9 Wheat. 738; Weston v. Charleston, 2 Pet. 449; People v. Commissioners, 2 Black 620; The Banks v. The Mayor, 7 Wall. 16; Western Union Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; Home Savings Bank v. Des Moines, 205 U. S. 503; Williams v. Talladega, 226 U. S. 404; Farmers' & Mechanics Savings Bank v. Minnesota, 232 U. S. 516; Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; Gillespie v. Oklahoma, 257 U. S. 501; Jaybird Mining Co. v. Weir, 271 U. S. 609; Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136; National Life Insurance Co. v. United States, 277 U. S. 508; Graysburg Oil Co. v. Texas, 278 U. S. 582; Macallen Co. v. Massachusetts, 279 U. S. 620; Missouri v. Gehner, 281 U. S. 313; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, and Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466.

Furthermore, it is difficult for us to understand on what logical basis the *Panhandle Oil Co., Indian Motocycle Co.* and the *Texas Co.* cases are selected as the cases, and the only cases here required to be overruled. To our mind, the precedents in fact as well as in principle that are closest to the cases at bar are *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank of United States,* 9 Wheat. 738, and the immunity from state taxation of federal securities or federal promises to pay as expressed in *Weston* v. *Charleston,* 2 Pet. 449, *The Banks* v. *The Mayor,* 7 Wall. 16, and *Farmers and Mechanics Bank* v. *Minnesota,* 232 U. S. 516.

If there is any distinction, for instance, between a state tax on the promise to pay for goods purchased in *The Banks* v. *The Mayor,* 7 Wall. 16, and the promise of the Government here to pay for goods and services, that distinction assuredly is in favor of the "private persons" here asserting the unconstitutionality of the tax. For in the cases at bar it is the very act of the Government in promising to pay to the contractor, followed by the execution of that promise by the Government, that gives rise immediately to the obligation to pay the questioned tax, based ratably upon the amount of that promise. In the earlier federal security cases the taxes held unconstitutional more remotely attached themselves to the governmental promises made to private owners and purchasers as they passed from one private hand to another.

Indeed, while cases condemning, as an interference with an essential governmental function, the taxation of contracts for the purchase of supplies are illustrations of the principle, they furnish by no means the closest analogy to the cases at bar. By what process of reasoning, unless it be by philosophic subtleties beyond the grasp of mind, can a contract evidencing one form of transaction by which the sovereign supplies its needs in peace or war be distinguished from another? To tax one is as much an interference with the sovereign as to tax another. How does a contract evi-

dencing a transaction by which the sovereign secures money differ from a contract evidencing a transaction by which the sovereign secures anything else needful to its service? Is interference with the governmental activity more or less direct in the case of a government bond, a treasury note, a certificate of indebtedness (in each case merely a contract evidencing a transaction by which the government procures needed money) than in the case of a contract for supplies or services? Finally, how does the promise to pay the debt created by the purchase of supplies differ from the promise to pay the debt created by the purchase of money or credit, and from the promises to pay the debt created in the present cases by the contractors' services?

Discussion of Cases Upon Government Securities.

We discussed in our opening brief many of the cases, such as *McCulloch* v. *Maryland,* 4 Wheat. 316, *Osborn* v. *Bank of United States,* 9 Wheat. 738, and the other cases following them cited in the margin of this brief, *supra* (p. 29). At present we wish to stress the direct and complete analogy between the cases at bar and those founded upon *Weston* v. *Charleston,* 2 Pet. 449, dealing with the immunity from taxation of securities of the national and state governments. An examination of these cases will disclose that this Court has consistently treated a "contract for the loan of money" as not to be distinguished from any other contract essential to the exercise of governmental power.

In *Weston* v. *Charleston,* 2 Pet. 449, it appeared that the United States had borrowed money and the contract to pay it was called "stock." The contract, however, amounted to a promise by the Government to repay the sum borrowed with interest. In the hands of a private individual this so-called stock was taxed by the City of Charleston. Chief Justice MARSHALL, speaking for the Court, said (p. 465):

> "The tax in question is a tax upon the contract subsisting between the government and the individual.

> It bears directly upon that contract, while subsisting and in full force."

Note particularly, if you please, these words:

> "If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract?"

Thus, the Court concludes that the questioned tax, resting nominally on the right of private persons to receive the benefit of the government's contractual promise to pay, is a tax, not on that private person, but, in constitutional effect, on the contract. Consequently, the Court further says (p. 468):

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract."

It is submitted this language shows that the Chief Justice entertained not the slightest doubt that a contract by which the United States obtained a loan of money and agreed to repay it differed in no essential particular from any other contract by which the United States might seek to procure anything essential for national purposes.

What other meaning of the language used "if the States * * * possess the power to tax *a contract for the loan of money,* what shall arrest this principle in its *application to every other contract*" can there be? May we pose a question ourselves, paraphrasing this language: If the states possess the power to tax a contract evidencing one form of government activity, what shall arrest this principle in its application to every other contract, and notably a contract for the loan of money?

We submit that the contract—stock—considered in *Weston* v. *Charleston,* 2 Pet. 449, and the contracts in the cases

at bar differ only in the form of governmental activity of the sovereign.

The Banks v. *The Mayor,* 7 Wall. 16, was decided shortly after the Civil War. The State of New York levied taxes upon the capital stock of The Banks. This capital stock was invested in what were known as "certificates of indebtedness." The origin of these certificates was as follows: During the War the Government obtained supplies and services on credit, promising to pay for them when it could. Thereafter it issued to these creditors certificates of indebtedness for the amount of their claims. May we remark at this point that it will be an ingenious and finely drawn distinction indeed which shall differentiate between the contracts made by the Government during the Civil War and the contracts under consideration in the present cases. That there is no distinction appears from the following language of the Court (p. 25):

> "* * * But we fail to perceive * * * that such certificates issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money."

Counsel argued: "The organs whereby the federal government carries on its operations are, we admit, exempt. But a certificate or statement of a *past indebtedness*—a mere *chose*—property in the hands of a citizen, is not a necessary instrumentality of the government. There is no particular virtue in the certificate. It affords ready proof of the debt but does not alter its character." The Court first examines and quotes the language of Chief Justice MARSHALL in *Weston* v. *Charleston,* 2 Pet. 449, and then remarks (p. 25):

> "* * * It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to per-

ceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money.

"The principle of exemption is, that the States cannot control the national government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control."

If in 1829 "a contract for the loan of money" is the same as any other contract for the exercise of sovereign power, and if in 1868 a contract which is "a means of executing constitutional powers of the government other than of borrowing money" is "as much beyond control * * * through taxation * * * as bonds * * * issued for loans of money," what has arisen now to distinguish a "contract for a loan" and a contract for the improvement of navigation or a contract for the purchase of necessary supplies? Does the essential nature of things change from day to day?

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, the Court considered the power of the United States to tax the income from municipal bonds issued by the State of New York. It will be observed of this case that the taxing act in question was a net income tax and was levied by the sovereign upon a municipal subdivision of a state. It is clear that a *net income tax* on *income* from "a contract for the loan of money" is far less direct an interference with the power to borrow and offers itself to distinctions of degree and of directness more readily than cases such as at bar. The Court, however, finds that there is no distinction between

the tax in the one case and the tax in the other. It quotes the language which we have quoted from *Weston* v. *Charleston,* 2 Pet. 449, and then remarks (p. 586):

> "Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

We submit that a tax levied upon the net income of an individual is a less direct interference with the national government's policy than a gross occupation tax upon the contract itself. Whether this be true or not, the language which we have quoted from the *Pollock* case shows that the rationale of the decision is that a tax in any form upon a contract for the exercise of sovereign power is void because it is an interference with the sovereign power itself. The rationale of the *Pollock* case then applies to the cases at bar. A municipal bond is "a contract for the loan of money" and as such evidences one exercise of sovereign power. Can there be any reason consistent with logic for prohibiting interference with the exercise of one sovereign power and permitting that interference with the exercise of another? We submit that "a contract for the loan of money" evidences an exercise of the power to borrow and that a contract to build a dam in a navigable river evidences the exercise of the power to regulate commerce. Both the power to borrow money and the power to regulate commerce are sovereign powers. Is there any reason why one is more essential to the sovereign than the other?

If distinctions of degree are to control, then the tax in question in this case, bearing as it does directly on the contract itself, is a much more direct and palpable interference with sovereign power than the tax in *Pollock* v. *Farm-*

ers' Loan & Trust Company, 157 U. S. 429, resting as it did only on the net income of the individual which included, among other items, interest from a contract evidencing the exercise of sovereign power.

In the case of *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, the tax statutes of Minnesota were held by the Supreme Court of that State to authorize the inclusion of certain bonds issued by municipalities in Indian Territory and the territory of Oklahoma in ascertaining the amount of the tax upon the assets of a bank. The tax was held invalid upon the principles laid down in *Weston* v. *Charleston,* 2 Pet. 449, and *McCulloch* v. *Maryland,* 4 Wheat. 316. Again the Court quotes the language of *Weston* v. *Charleston.* The opinion was delivered after an exhaustive review of the cases and the principles involved. At page 526 the Court says:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them."

Again we find this opinion interesting. The rationale is: that a territory is an instrumentality of the United States government; that a municipality of a territory is likewise an instrumentality of the United States government; that the power of the municipality to borrow money is the exercise of a sovereign power of the United States; that a tax upon a municipal bond of the territory, while in the hands of a private person, is an interference with the exercise of a sovereign power of the United States. Now, it might seem that the inconvenience suffered by the United States by such a tax was not great except in principle. The Court will note that the tax was levied on all alike, resting only incidentally upon the municipal bonds along with other property. The Court will likewise note that the exercise of soverign power is not

by the sovereign directly but by the agent of an agent of the sovereign. And yet this Court finds such a tax is "in the last analysis, to impose a tax upon the right of the municipality to issue them," and deems it entirely clear that such a tax "is a tax upon the operations of the government." Truly, if such a tax interfered with the exercise of sovereign power by the United States, then the tax in the cases at bar levied directly upon a contract for the exercise of sovereign power is an interference with it.

In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, a license tax upon insurance companies was measured by the gross income from all sources. The tax was at the rate of 3%. The Supreme Court of Wisconsin sustained a tax upon an insurance company which included in the gross income the interest from United States bonds. The Court remarks that it is not even attempted to be denied that bonds of the United States are beyond the taxing power of the states, and that it is the settled doctrine of this Court that no valid tax can be laid upon the income from such bonds because, "To tax this would amount practically to laying a burden on the exempted principal." The Court then notes the fact that a tax measured by gross receipts amounts to a direct charge, where a tax measured by net income does not. The conclusion follows (p. 141):

> "Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the Company from United States bonds. So much, in any event, the State took from these very receipts. This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the State."

The direct and complete analogy of the tax upon the "contract for the loan of money" examined in this case and the tax upon the contracts in the cases at bar is at once evident. Here, as in that case, the taxing statute undertakes "to impose a charge of .... per cent. upon every dollar • • •

received by the Company * * *." Here, as there, "So much, in any event, the State took from these very receipts." Does not the conclusion follow here that the tax "amounts * * * to an imposition upon" the contracts themselves and "goes beyond the power of the State."

In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, the Court was called upon to consider the validity of a statute of Massachusetts, imposing an excise tax upon corporations measured as to its amount, partly by the net income which was defined so as to include interest upon United States securities. The tax was held to be invalid as an interference with a constitutional power of the United States upon the principle set forth in *Weston* v. *Charleston*, 2 Pet. 449, which the Court remarks has never been departed from. The following language was used (p. 624):

> "* * * A state tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive. * * *"

The invalidity of the tax depends, then, upon whether it "interferes or tends to interfere with the constitutional power of the general government." In the *Macallen* case the constitutional power of the general government in question was the power to borrow money. In the present case it is the power to regulate commerce. Unless there be some reason in constitutional law which permits the states to interfere with the constitutional power of the general government to regulate commerce, while it does not permit them to interfere with its constitutional power to borrow money, the cases at bar show an example of interference more direct in kind and more burdensome in fact than the *Macallen* case or any of the other cases holding taxation of government securities void.

We will not extend this brief by a discussion of the scores of cases which consider the validity of taxes upon securities issued by the United States or the states. Suffice it to say that there are many more of them which this Court has decided, that the cases in the state appellate courts and in the lower federal courts announcing and applying the principle of the cases we have commented upon in this brief are legion, and that each and all of them depend upon the principle announced in *Weston* v. *Charleston*, 2 Pet. 449.

The Adoption of the Test Proposed by the Government is a Departure From Accepted Principles so Radical That It Amounts to an Amendment of the Constitution.

It will not escape notice that in every case the "contract for the loan of money" is between the government and a private person. In no case does the government borrow from itself or from its agencies. The relation of the government to the private party from whom it borrows, and the relation of the government to the private person from whom it purchases supplies, and the relation of the government to the contractor in the cases at bar differs in no way important in the application of constitutional principles. The test of constitutionality of a tax statute in these cases, as in the cases discussed in our opening brief and cited in the margin, *supra* (p. 29) is the same; namely, whether the interference with a national enterprise is palpable and direct, or remote and consequential.

The test of the validity of a tax upon a national undertaking is not the additional cost to the nation. It is not a question of dollars, more or less. The test is interference with a national enterprise. This is the test applied by this Court in every case, commencing with *McCulloch* v. *Maryland*, 4 Wheat. 315; *Osborn* v. *Bank of United States*, 9 Wheat. 738, and *Weston* v. *Charleston*, 2 Pet. 449, down to *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383,

and the other cases decided during the present year. By this test the cases are consistent, one with another, and together furnish a practical guide for the taxing authorities, national and local, and for the people in their dealings with the national and local sovereignties. Upon the manifest necessity of such a rule, and upon the precedents showing the application of the rule to particular circumstances, rest a vast number of decisions in the state appellate courts and the lower federal courts. By this principle the framers of the constitutions of the newer states were guided and the legislatures of all of the states have framed their taxing systems in harmony with it.

If for this rule another is to be substituted, it will be necessary to commence at the beginning and through the years rebuild a new system, or else what was harmonious and consistent will become incongruous and impractical. If for the test of interference is substituted the test of amount of cost, or the test of discrimination, or the test of character of persons with whom the sovereign deals, or the test of form in which the taxing interference be cast (regardless of the effect), then what was as clear and easily applied as any rule of law can ever be becomes confusion worse confounded. If in the past any philosophic subtleties or finely drawn distinctions have been indulged in by the courts in applying the rule, the remedy does not lie in establishing a new set of equally subtle and equally conceptualistic applications. The remedy lies rather in refusing to elaborate subtleties of distinction.

However, if for any reason the amount which the national government would be compelled to pay the states or their municipal taxing districts has any relevancy as showing the practical effect of a rule permitting taxation, it is not sufficient to consider the amount and effect of such taxes in times of peace and prosperity alone. The amount and effect of such taxes in times of emergency and stress should be considered. An annual burden on the national government

of ten million dollars may be negligible today. On the other hand, were the nation engaged in a life or death struggle, such as the Civil War, not only would the amount be increased but the burden might well make the difference between survival and destruction.

In the World War every great nation strained its resources to the breaking point—some even beyond that point. Is it beyond a possibility which ought to be considered that the United States may some day be required to expend its every resource for self-preservation? A rule permitting the state, the county, the school district, the port district, the city, and such other municipal taxing subdivisions as are empowered to levy taxes within the same territorial limits, to tax the supply of munitions of war at a time of national emergency would place the very existence of the nation at their discretion. Perhaps this result is not to be apprehended; perhaps there is no need for the national government to have the power to make war or carry out any enterprise in peace. A national government whose powers are much restricted may be better than the government established by the Constitution. Whether better so or not, at least the change is radical.

The principle that a grant of power to the national government excludes interference by the states with the exercise of that power was announced early in our history. It has been repeated time and again—indeed, it has never been seriously questioned. Mr. Justice HOLMES in *Clallam County* v. *United States,* 263 U. S. 341, phrased the proposition thus (p. 344):

> "* * * the prohibition established by *McCulloch* v. *Maryland,* 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. * * * The immunity is derived from the Constitution in the same

sense and upon the same principle that it would be if expressed in so many words."

If at any time since *McCulloch* v. *Maryland,* 4 Wheat. 316, there has been a need for amendment of the Constitution, so as to abrogate this principle, whether in prosperity and peace, in time of civil war or invasion, or in times of panic and depression, an amendment to the Constitution has always been available to furnish a remedy. Today, if there has arisen any need for change, still an amendment to the Constitution is possible.

That so violent a change in the fundamental law ought, if necessary at all, to be with the consent of the people by means of an amendment to the Constitution, is evident. Likewise it is evident that the taxes here considered interfere with an essential activity of the United States government much more directly than the taxes imposed upon the contracts for the purchase of supplies examined in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, or the taxes imposed upon the contracts for securing money or credit examined in such cases as *Weston* v. *Charleston,* 2 Pet. 449; *The Banks* v. *The Mayor,* 7 Wall. 16; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136.

This the Government Brief recognizes, for it quite frankly admits that to sustain the present taxes it will be necessary to overrule *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 571; and *Graves* v. *Texas Company,* 298 U. S. 393 (Govt. Br., p. 6) and to criticize the cases declaring that a tax upon the contract (stocks, bonds, notes, certificates, etc.) for the repayment of money borrowed is an interference with an essential governmental power.

Likewise it appears from the brief (Appendix B, p. 121) that 75.4%, or three fourths of all federal construction work begun during 1936 was by contract with private individuals. Obviously some reasons of convenience or economy dictate this policy of the government. Obviously again it will be a direct and palpable interference with the national government if local theories of taxation or local financial necessities are permitted to interfere with this policy.

But if it be admitted—as clearly it must—that gross occupation taxes on construction contracts with the government are more palpable and much more direct interference with the government than a sales tax, then to sustain the present taxes either a complete abandonment of the fundamental principle of non-interference or the drawing of ingenious distinctions where none exist in fact, is necessary. It will not suffice to reexamine and overrule the cases of *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and *Graves* v. *Texas Co.,* 298 U. S. 393, as they cannot be distinguished from *Weston* v. *Charleston,* 2 Pet. 449; *The Banks* v. *The Mayor,* 7 Wall. 16; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516; and *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136, and the long line of other cases holding it to be an interference with the sovereignty to tax a contract evidencing the exercise of the borrowing power. It will be necessary also to re-examine and overrule the cases of *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of United States,* 9 Wheat. 738; and the cases founded upon them, discussed in our opening brief. Such a program is one that staggers the imagination.

This Court has established and followed consistently certain distinctions in applying the principle that taxes upon dealings with the sovereign are invalid depending upon whether they interfere or tend to interfere with the exercise of sovereign powers. For instance, it is ruled that inter-

ference occurs only when the tax in substance (as distinguished from words or form) is laid upon the transaction with the sovereign. It is possible that two taxing acts may upon superficial examination appear alike in form because expressed in somewhat similar words. If, however, careful analysis shows them to be different in substance, then their essential nature must govern. This seems simple. There are no philosophic subtleties in this.

The case of *Liggett & Myers Tobacco Co.* v. *United States,* 299 U. S. 383, is an example. A federal tax was levied on the manufacture of tobacco. This tobacco was thereafter sold to the Commonwealth of Massachusetts. The tax was sustained, the Court pointing out that the tax in reality was upon the manufacture, using the following words (p. 386):

> "The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. * * *"

This case is distinguished by the Court from *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, as follows (p. 387):

> "*Indian Motocycle Co.* v. *United States, supra,* much relied upon by petitioner, considered a tax of five per centum of the price obtained upon sale of the article; it rose or fell according to the amount received by the seller."

We fail to perceive any practical contradiction between *Liggett & Myers Tobacco Co.* v. *United States,* 299 U. S. 383, and *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. Perhaps the form of the taxing acts had some outward similarities. However, when examined, in the one case the tax was found to rest upon the transaction with the sovereign because the amount of the tax was measured by the terms of the contract between the private individual and the

sovereign (the sale price), while in the other case the amount of the tax was not measured by or dependent upon the transaction with the sovereign.

An equally simple and clear distinction which has frequently been made the rule of the decision is that a tax upon the property owned by a person dealing with the sovereign does not bear upon the transaction with the sovereign, and consequently does not interfere with it. The sovereign is concerned, when dealing with private parties, only with interference with the transaction, not with other matters. The property and personal rights and obligations of the person with whom the sovereign deals are of no concern to it. It is concerned, however, with the transaction by which it secures that which it desires. If the tax be levied on the property of a private person, the sovereign is in no manner affected. If the tax be levied on the transaction with the sovereign, immediately the sovereign is affected.

The case of *Alward* v. *Johnson,* 282 U. S. 509, and the cases at bar again bear a superficial resemblance, resulting from the words employed in the taxing acts. In *Alward* v. *Johnson,* this Court upheld a California tax on the equipment of bus lines, measured by gross receipts. But mark the distinction. The Supreme Court of California had repeatedly held the tax to be a property tax levied in lieu of a tax on the property of the line, and not to be an excise tax on the privilege of carrying the mails for the United States government. The tax under consideration in the cases at bar is thus described by the Supreme Court of the State of Washington in *State* v. *Yelle,* 174 Wash. 402, 406, 407:

> "* * * we are well satisfied that this is not a property tax, even under the broad and all inclusive terms of our constitution. * * *
>
> "This act does not concern itself with income which has been acquired, but only with the privilege

of acquiring, and that the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved."

The Supreme Court of the State of Washington in its decision in the present case, while holding that the tax had for its purpose, revenue, notes that it is an excise and not a property tax (No. 7, R. 57). The Court will note that it stands admitted that the tax in question here is not in lieu of property taxes but is in addition thereto. It scarcely needs remark that a decision upholding a tax upon the property of a private party having dealings with the sovereign has no relevance in considering an excise tax upon the privilege of carrying on dealings with the sovereign. So long as the nature of things differs, there must be distinctions in the law or it ceases to reflect actualities.

Discrimination as a Test of Validity.

We do not deny that this Court can detect and destroy any discrimination against the national government which may in fact appear in a taxing ~~act~~, regardless of form or disguise. National and state legislative bodies have before this attempted to accomplish what is forbidden under guise of what is permissible. Such attempts have been detected if not with ease, at least with ultimate success. On the other hand, why is it reasonable to suppose that an intent to discriminate against federal activities, or an actual discrimination without such intent, can be more easily detected and prevented than interference with federal activities? The attempt to define and apply to varying circumstances the generality "discrimination" is not less of a task than the attempt to define and apply "interference." Will not the shadowy line of what is or is not discrimination be as difficult to see with precision or to define with perfect clarity as any other general idea? Or is it to be supposed that legis-

lators will be less astute in masking discrimination under some form which is "fair to see."

The answer lies in the cases commented on in the Government Brief, pages 30-32. We are not willing to admit that the presence or absence of discrimination had aught to do with the deciding of these cases. If in argument this ground was urged as a test of validity, or invalidity, we think the very fact that the decision is based on other grounds shows that the test was rejected. But will the Court note how cunningly the discrimination was disguised in the cases, as stated by the Government Brief. And was the detection easy or did all members of the court agree either that it was present in fact or upon the formula for detecting its presence? In short, is it not clear, all other considerations apart, that discrimination will be a less satisfactory test because of the very difficulty of determining what amount of discrimination is permissible and when it is present or absent, in fact or in intent?

For example, in Note 11, page 30 of the Government Brief it is stated:

> "The exaction there was applicable only to branches of banks not chartered by Maryland (4 Wheat. 316, 320-322). It was asserted by Pinckney in his argument that the Bank of United States was the only such bank operating in the State (4 Wheat. at 392) and this apparently was not challenged by opposing counsel or doubted by the Court."

We would suppose that the states might classify foreign corporations as a distinct class for taxation purposes without showing an intent to discriminate against the United States. Again, would the mere fact that the Bank of United States happened at a particular moment to be the only bank which brought itself within the general class, show discrimination, either in intent or in fact? Is not Pinckney's argument, at page 392 of the report, the weakest and least convincing part? And does not the opinion of the Court,

placing the decision on other grounds, show that the Court believed that discrimination as a test was unsound and unsafe?

The Mwak Company.

We are surprised that the government should think it worth while to quibble over whether the corporation organized by the contractors, wholly owned by them, and officered and directed by their officers, is or is not their agent. Suffice it to say that the amended complaint (No. 7, R. 6, 7) pleads these facts and pleads that the contract is being performed by the contractors through this corporation as their agent. This allegation was admitted. The Attorney General of the State of Washington made no question concerning the matter in the trial court, nor on appeal to the State Supreme Court, nor on the appeal to this Court. None of the courts before whom this case has been argued has apparently considered the matter of the slightest importance since it has never before even been mentioned. The contract with the government of the United States has not been sublet, assigned or transferred in any manner. The parties who signed that contract remain responsible for its performance to the United States. To them is paid the agreed compensation, a part of which the State assumes to take under the guise of a tax. We should suppose that interference with the government's business, or the reverse, was the vital question at issue in this case, not the question of what agents, employees, means or methods the contractors choose to carry out their agreement.

Appendix B of Government Brief.

Perhaps a word of comment on Appendix B of the Government Brief is in order. This Appendix is in the nature of a factual or economic study, directed to the volume of taxation which might be realized from contractors and vendors dealing with the Federal or State Governments

respectively. We think its estimates in no way a helpful contribution.

It is prefaced by the candid statement that:

> "It is wholly impossible to make a tolerably satisfactory estimate of the savings which the Federal Government derives from the doctrine that its contractors and vendors are immune from gross receipts and sales taxes. * * * Even if a precisely accurate estimate could be made, and a figure be reached as to the comparative savings realized under existing legislation, the result would have only a transitory significance. None can predict the future tax structures either of the states or of the nation."

With this statement it is impossible to disagree. It demonstrates the irrelevance to a discussion of the underlying principle of any current statistics on the subject.

It occasions surprise, therefore, to read on turning the page that counsel for the Government feel it necessary to undertake the task which they have conceded to be impossible. They preface this attempt with the remark (Govt. Br., p. 120):

> "However, we have assumed that any estimate, however unsatisfactory, is better than none."

Why this should be true we are at some loss to understand. Unless, indeed, lights along the shore, no matter how false, are better for the mariner than steering by the stars.

We do not feel it necessary to criticize in detail the manner in which the remainder of this Appendix is built up. But when it is interspersed with such statements as:

> "We again repeat that the margin of error in this estimate is probably several hundred per cent" (p. 128);

or

> "We again emphasize that this figure is so rough that it cannot be thought to be even approximately correct" (p. 129),

it would seem to be clear that the statistical estimates in the Appendix do not serve even "for the purposes of an illustrative guess."

It is suggested that the admitted additional burden upon the national government arising from taxation by the states and their municipalities, and hence the additional taxation of the people of the whole nation, will "be offset by Federal taxes upon those who deal with the States; and none can tell whether under future tax structures the balance will lie with the central government or with the States" (Govt. Br., p. 3). In short, the result of reciprocal taxation, national and local, will be the same as reciprocal exemption from taxation.

This leaves out of account the cost of tax collection. The machinery by which taxes are levied and collected is both cumbersome and expensive. Only a fraction of the total amount levied as taxes ever reaches the national or local treasuries. The difference is the cost of the levy and collection. Thus, if local and national reciprocal impositions exactly balance, the national and local treasuries receive the same amounts, but what of the people? While the treasuries have received the same amounts, the people who pay the national and local taxes have suffered by the additional burden of the cost of levy and collection of the additional taxes. The tax gatherer multiplies and flourishes. The legions of the Internal Revenue Department increase. The local assessors, examiners and collectors grow in number.

This is the result, if the reciprocal exactions exactly balance. But the writer of the Government Brief candidly admits that it is impossible to guess which side would get in ahead in the race to see who could impose the heavier burden. Our own impression is that the reciprocal exactions would vastly increase but would never balance. First one side would increase its taxes on the other, and then the other would increase its taxes on the first. Since either the local or the national treasury would suffer if the exactions did not

balance and the people of the one government or the other would have their funds diverted from the purpose for which they were appropriated, we fancy that the taxpayer in the end would bear the burden of the suggested beautiful, simple and easy (for the tax collector) system.

We submit that the Grand Coulee Project is a national enterprise undertaken by the national government for the benefit of the people of the nation as a whole, and that it is paid for by the national money obtained through taxation upon the people of the nation. By what right do the residents within a single state seize as their own exclusive property, and divert to their own exclusive ends, money of the people of the nation collected by the national government upon trust to be used for national purposes? In medieval times, the barons who had seized and maintained strongholds along trade routes demanded tribute from the merchants who were obliged to travel there to reach their trading posts. Can it be seriously urged that the national and state governments shall lie in wait, one for the other, because, forsooth, the exactions of one theoretically can be made to balance the exactions of the other, provided that the expensive legion of tax gatherers, like the expensive panoply of iron-clad mercenaries, be left out of account?

Conclusion.

A major portion of the land on which all contracts pertaining to the Grand Coulee Project are performed were acquired by the United States through purchase, that is, condemnation and conveyance, with the consent of the State of Washington. The balance of the territory was acquired by cession from the State of Washington.

The dam is a needful building and, therefore, within the purview of Clause 17 of Section 8, Article I of the Constitution of the United States. Thus, exclusive jurisdiction has been vested *ipso facto* in the United States Government and

no further acts on the part of either the Federal or State Government were necessary.

The acquisition of the lands comprising the territory through purchase and cession, and the exclusive jurisdiction thereover transferred to the United States by the State of Washington had the full consent of Congress through its act of ratification of the Grand Coulee and Parker contracts. The only reservation that was permitted to the State of Washington is that which is embodied in Section 8108, that is, the right to serve process for any cause, civil or criminal, within the area for actions arising outside the area acquired.

Hence, the State of Washington, upon this branch of the case, was completely without power to impose any tax upon the gross income received by appellants under their contracts with the United States for the construction of the Grand Coulee Dam.

The immunity of the appellants from taxation by the State of Washington upon the gross income received under their contracts with the United States is that which has been afforded since *McCulloch* v. *Maryland*. It does not depend at all upon the doctrine of reciprocal immunity. To permit the tax upon the appellants in the instant cases would amount to an amendment of the Constitution of the United States, without action by the people. Neither policy nor logic justifies any infringement upon this well-conceived and well-founded principle of sovereignty of the Federal Government.

It is submitted that the judgments of the Supreme Court of the State of Washington in these causes should be reversed and judgment rendered in favor of appellants.

Respectfully submitted,

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